STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 23, 2004
v	No. 246819 Wayne Circuit Court
DARIUS B. THOMAS, Defendant-Appellant.	LC No. 01-009199-01

Before: Neff, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to consecutive prison terms of twenty-two to thirty-three years on the second-degree murder conviction and two years on the felony-firearm conviction. We affirm.

I

Defendant first argues that the trial court erred when it instructed the jury on both first-degree premeditated murder and second-degree murder. We disagree. Errors in jury instructions are questions of law that are reviewed de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002). A reviewing court examines the jury instructions as a whole, and reversal is only required when the jury instructions fail to protect a defendant's rights by unfairly presenting the issues to be tried. *People v Dumas*, 454 Mich 390, 396; 563 NW2d 31 (1997).

In *People v Cornell*, 466 Mich 335, 358; 646 NW2d 127 (2002), our Supreme Court overruled *People v Jenkins*, 395 Mich 440; 236 NW2d 503 (1975), which had held that in a first-degree murder trial, the trial court is always to instruct the jury on the lesser-included offense of second-degree murder. *Cornell* stated that even in a first-degree murder trial, a jury is to be instructed on a necessarily included lesser offense only if the greater offense requires the jury to find a disputed factual element that is not part of the lesser offense and a rational view of the evidence at trial would support such an instruction. *Cornell*, *supra* at 357. Second-degree murder is a necessarily lesser-included offense of first-degree murder. *Jenkins*, *supra* at 442, overruled on other grounds, *Cornell*, *supra* at 358. Thus, the resolution of this issue turns on whether "the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *Id.* at 357.

Defendant argues that because premeditation and deliberation were not at issue in this case, the trial court erred in instructing on second-degree murder. We disagree. "To premeditate is to think beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem." *People v Morrin*, 31 Mich App 301, 329; 187 NW2d 434 (1971). A finding of premeditation and deliberation requires that there be a lapse of time for a defendant to take a second look before acting. *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998). "Premeditation and deliberation may be inferred from all the facts and circumstances, but inferences must have support in the record and cannot be arrived at by mere speculation." *Id*. at 301.

A rational view of the evidence presented in this case showed that premeditation and deliberation were in dispute. There was evidence that defendant was carrying a gun when he approached the victim. Defendant angrily confronted the victim about the victim having reported defendant to the police. Defendant shot the victim multiple times, inflicting critical wounds to the victim's left lung, left ventricle, and aorta. These facts could reasonably support the conclusion that the killing was done with premeditation and deliberation. Conversely, the evidence also reasonably supports a finding that the killing was done in "hot blood," the result of a chance and volatile meeting between defendant and the victim. *People v Fletcher*, 260 Mich App 531, 558 n 11; 679 NW2d 127 (2004). Therefore, because a rational view of the evidence showed that premeditation and deliberation were in dispute, the trial court did not err when it instructed the jury on second-degree murder.

II

Defendant argues that he was denied a fair trial because of misconduct on the part of the prosecutor during closing argument. We disagree. This Court reviews claims of prosecutorial misconduct de novo to determine whether a defendant was denied a fair and impartial trial. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Issues of prosecutorial misconduct are decided on a case by case basis, and this Court must review the pertinent portion of the record to evaluate the remarks in context. *People v Rice (On Remand)*, 235 Mich App 429, 435; 597 NW2d 843 (1999).

To the extent that defendant did not object to the prosecutor's closing argument at trial, we review for plain error affecting substantial rights. *Id*. This Court will not reverse unless the plain error resulted in the conviction of an actually innocent defendant or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id*. at 448-449.

A

Defendant argues that when the prosecutor stated "[defendant was] not willing to own up to his actions, to accept the responsibility of what he did," the prosecutor was improperly commenting on defendant's failure to present evidence or to testify, thereby improperly shifting the burden of proof to defendant. While a prosecutor may not comment on a defendant's failure to present evidence or testify, *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003), the prosecutor's comments in this case did not cross the line from proper to improper argument. When the prosecutor requested the jury "to put that responsibility on [defendant] and find him guilty," the prosecutor was not asking defendant to explain the evidence against him. *People v Green*, 131 Mich App 232, 237; 345 NW2d 676 (1983). Rather, she was simply

requesting that the jury find defendant guilty because all of the elements of the crime had been proven. Therefore, there was no plain error affecting defendant's substantial rights.

B

Defendant claims that the prosecutor committed misconduct by misstating the evidence presented at trial. Defendant did not object to this argument. We find no error requiring reversal.

First, defendant claims that the prosecutor incorrectly stated that Lacresha Garrett's trial testimony that defendant shot the victim five times was consistent with her preliminary exam testimony in July when, in fact, it was inconsistent because Garret testified at the preliminary examination that defendant shot the victim four times. Second, defendant claims that the prosecutor incorrectly stated that Jason Ivey's testimony corroborated Garrett's testimony that defendant fired the last shot while standing over the victim after the victim had fallen to the ground.

Contrary to the prosecutor's closing argument, Garrett's preliminary examination testimony in *August* 2001 was that defendant shot "about four times," not five times. However, as defense counsel emphasized during cross-examination of Garrett, during a previous trial in *July* 2002, Garrett testified that defendant shot five times. The prosecutor may have mistakenly referenced the preliminary examination rather than the previous trial in commenting on Garrett's previous *July* testimony. With regard to misstatements about Ivey's corroboration, the prosecutor stated that Ivey corroborated the "big picture" given by Garrett, not the "little details." Further, during his testimony, Ivey denied that he saw the shooter shoot the victim while standing over him, denied telling that to the police, and testified that the police statement was incorrect in that regard. Viewed in context, any misstatements by the prosecutor were isolated and brief, and subject to evaluation by the jury in light of the testimony and evidence presented. We cannot conclude that any error affected defendant's substantial rights.

Moreover, the trial court instructed the jury that the attorneys' statements were not evidence and that the case should be decided on the evidence. The trial court also emphasized defendant's presumption of innocence and the prosecutor's burden of proof on all of the elements in the case. Therefore, even if the prosecutor's comments were in error and prejudicial, the trial court issued instructions that cured any resulting prejudice that may have resulted. *People v Bahoda,* 448 Mich 261, 281; 531 NW2d 659 (1995).

C

Defendant claims that he was denied a fair trial by the prosecutor's statement in rebuttal argument that defendant was four to five inches taller than the victim, because there was no evidence presented concerning defendant's height and he did not testify. Defense counsel objected to the prosecutor's statements comparing the heights of defendant and the victim, and the court noted that the jury would decide based on the testimony. Ivey testified that the shooter was "about five seven, five eight, in there." Garrett testified that defendant was the shooter. This testimony provided a basis for the prosecutor's statements. Further, the jury had ample opportunity to view defendant during trial and evaluate the prosecutor's argument accordingly. Defendant was not denied his right to a fair trial on the basis of the alleged misconduct. *Rice, supra* at 434-435.

III

Defendant argues that he was denied the effective assistance of counsel on the basis of several errors. To establish ineffective assistance of counsel, a defendant must show (1) that his trial counsel's performance fell below an objective standard of reasonableness, and (2) that the defendant was so prejudiced that he was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Id.* at 302; *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Because defendant did not raise this issue in an appropriate motion in the trial court, this Court's review is limited to the facts contained on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

A

Defendant claims that counsel was ineffective for failing to object to several instances of prosecutorial misconduct. Given our above findings of no error or that defendant was not unfairly prejudiced by the prosecutor's remarks, defendant's ineffective assistance claim fails. Defendant has failed to show a reasonable probability that the errors, if any, were outcome determinative.

B

Defendant additionally claims that counsel was ineffective for failing to call certain witnesses, to cross-examine Ivey regarding the shooter's height, and to investigate, interview, and locate certain witnesses. Given their statements to police, counsel's decision not to call certain witnesses may have been a matter of trial strategy because their testimony would corroborate testimony that incriminated defendant. Decisions regarding what evidence to present and whether to call witnesses are presumed to be matters of trial strategy. *Rockey, supra.* Defendant has failed to overcome this presumption. In any event, defendant's claims fail because no mistake of counsel is apparent on the record and defendant has failed to show that the additional evidence would have been favorable to him. *Rodriguez, supra* at 38; *Rockey, supra* at 77-78.

IV

Finally, defendant argues that the cumulative effect of trial errors denied him a fair trial. We review this issue to determine whether the cumulative effect of multiple errors denied defendant a fair trial. *Ackerman, supra* at 454. However, "only actual errors are aggregated to determine their cumulative effect." *Bahoda, supra* at 292 n 64. On the basis of our above conclusions with regard to the individual claims of error, we find no basis for reversal of defendant's convictions on a claim of the cumulative effect of individual errors. *Ackerman, supra.*

Affirmed.

/s/ Janet T. Neff
/s/ Michael R. Smolenski
/s/ Brian K. Zahra